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Khamis bin Mohd Norhari v Amir Hamzah

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO (MT-1)12–9 OF 2007
B VERNON ONG JC
14 AUGUST 2008

C *Damages (Personal Injury or Death) — Personal injuries — Loss of future earnings — Entitlement for — Whether receiving earnings at date of accident — Whether claimant satisfied provisions of s 28A(2)(c)(ii) of the Civil Law (Amendment) Act 1984*

D *Tort — Damages — Personal injuries — Quantum of damages for loss of future earnings — Whether receiving earnings at date of accident — Whether claimant satisfied provisions of s 28A(2)(c)(ii) of the Civil Law (Amendment) Act 1984*

E

The plaintiff/respondent's claim against the defendant/appellant arose from an accident between the parties. The sessions court, having found the appellant to be wholly at blame, awarded damages, inter alia, for loss of earnings in the sum of RM24,000 together with interest to the respondent.
F Prior to the date of the accident the respondent was a welder who worked on a contract basis. As a result of the injuries, the respondent was unable to work for a period of one year after the date of the accident. The appellant's appeal against the decision of the sessions court judge was limited only to the issue of loss of future earnings. It was the appellant's contention that based on the
G circumstances of the case the respondent could not said to have been receiving earnings at the date of the accident.

H **Held**, allowing the appeal with costs:

(1) Section 28A of the Civil Law (Amendment) Act 1984 ('the Act') prescribes a fixed guideline as to the awarding of damages for the loss of future earnings in personal injury claims. Based on s 28A(2)(c)(ii) of the Act, a person who was not receiving earnings on the date of the
I accident is not entitled for any loss of future earnings. Such a person would include a person who was on no pay leave, unemployed, recently retrenched, laid off temporarily or those whose employment are not permanent. It would also include a contract worker whose employment depends on the availability of contracts or projects and who was, on the

date of the accident, unemployed. The evidence adduced proved that the respondent was not gainfully employed at the time of the accident hence not satisfying the said provision (see paras 6 & 8); *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103 and *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 followed.

(2) In an appeal against the quantum of damages, it is settled law that the onus is on the appellant to establish that the award may only be altered if the trial judge acted on a wrong principle of law or had misapprehended the facts or had made a wholly erroneous assessment of the damages suffered. The sessions court judge had erred by applying the wrong principle of law by awarding damages for loss of future earnings with disregard to the guidelines of the said provision. Accordingly, the award for loss of earnings was set aside (see para 4).

[Bahasa Malaysia summary

Tuntutan plaintif/responden terhadap defendan/perayu berbangkit dari kemalangan di antara pihak-pihak tersebut. Di mahkamah sesyen, setelah mendapati perayu bersalah secara keseluruhannya, mengawardkan ganti rugi, antara lain, untuk kehilangan pendapatan untuk jumlah sebanyak RM24,000 bersama faedah kepada responden. Sebelum tarikh kemalangan, responden merupakan seorang tukang kimpal yang bekerja secara kontrak. Disebabkan oleh kecederaan yang dialami, responden tidak boleh bekerja untuk tempoh selama setahun selepas kemalangan. Rayuan perayu terhadap keputusan hakim mahkamah sesyen terhad hanya kepada isu kehilangan pendapatan masa hadapan. Ia adalah hujahan perayu bahawa berdasarkan hal keadaan kes, responden tidak boleh dikatakan sebagai menerima pendapatan pada tarikh kemalangan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 28A Akta Undang-Undang Sivil (Pindaan) 1984 (Akta tersebut) menetapkan garis panduan yang tetap mengenai pengawardan ganti rugi untuk tuntutan kehilangan pendapatan masa hadapan. Berdasarkan kepada s 28A(2)(c)(ii) Akta tersebut, seseorang yang tidak menerima pendapatan pada tarikh kemalangan tidak berhak terhadap apa-apa kehilangan pendapatan masa hadapan. Orang yang sedemikian termasuk seseorang yang sedang dalam cuti tanpa gaji, tidak bekerja, baru dibuang kerja, dihentikan sementara atau sesiapa yang pekerjaannya tidak tetap. Ia juga termasuk pekerja kontrak yang pekerjaannya bergantung kepada adanya kontrak atau projek dan yang, pada tarikh kemalangan, tidak bekerja. Keterangan yang dikemukakan membuktikan bahawa responden tidak bekerja pada masa kemalangan

dan oleh itu tidak memenuhi peruntukan tersebut (lihat perenggan 6 & 8); *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103 dan *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 diikuti.

(2) Di dalam rayuan terhadap kuantum ganti rugi, ia adalah undang-undang matan bahawa beban adalah ke atas perayu untuk membuktikan bahawa award hanya boleh diubah jika hakim bicara bertindak atas prinsip undang-undang yang salah atau telah tersalah faham fakta atau telah membuat penilaian yang keseluruhannya salah terhadap kerosakan yang dialami. Hakim mahkamah sesyen juga terkhilaf apabila menggunapakai prinsip undang-undang yang salah dengan mengaward ganti rugi untuk kehilangan pendapatan masa hadapan tanpa menghiraukan garis panduan peruntukan tersebut. Oleh yang demikian, award untuk kehilangan pendapatan diketepikan (lihat perenggan 4).]

Notes

For cases on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 745–777.

For cases on personal injuries, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 236–238.

Cases referred to

Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor [1995] 3 CLJ 317 (distd)

Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors [1990] 3 MLJ 103 (refd)

Hang Jong Juan v Tan Yeo Soon [1986] 2 MLJ 5 (refd)

Low You Choy & Ors v Chan Mun Kit & Ors [1992] 3 CLJ 1550 (not folld)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239 (refd)

Ngooi Kim Chong v Subramanian a/l Maruthan & Anor [1990] 1 CLJ 799 (distd)

Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42 (refd)

Legislation referred to

Civil Law (Amendment) Act 1984 s 28A, 28A(c), 28A(2)(c)(ii)

L Renganathan (Loh & Renga) for the plaintiff.
Aru (Aru Anita & Associates) for the defendant.

Vernon Ong JC:

[1] This is the defendant's appeal against the decision of the learned

sessions court judge given on 11 January 2007. The appeal relates only to the issue of loss of earnings.

BACKGROUND FACTS

[2] The plaintiff's claim against the defendant is for damages arising from an accident on 26 October 2002 at the junction of Jalan Besar Pasir Gudang/Jalan Keluli involving the plaintiff's motorcycle and the defendant's motorcar. After the trial of the action the learned sessions court judge ('SCJ') found the defendant wholly to blame for the accident. Loss of earnings in the sum of RM24,000 together with interest at the rate of 4% per annum from the date of the accident (26 October 2002) until the date of judgment were, inter alia, awarded in favour of the plaintiff.

[3] Prior to the date of the accident the plaintiff was a welder who worked on a contract basis. He would often be contracted by a to work as a welder. In cross-examination the plaintiff admitted that: 'Saya setuju kerja saya adalah tidak tetap. Saya setuju pada masa 26 October 2002 saya tidak mempunyai kontrak kerja.' And in re-examination the plaintiff clarified that: 'Saya adalah pekerja di Mestika Yakin Sdn Bhd sebagai sub-contract. Tempoh tiap-tiap kontrak kadang-kadang enam bulan, kadang-kadang kurang dari enam bulan dan ada yang lebih dari enam bulan. Habis satu kontrak, ada kontrak yang baru masuk. Pada masa kemalangan saya tidak ada kontrak kerana kontrak telah habis dan kontrak baru belum masuk.' During his period of work the plaintiff earned about RM2,500 per month. As a result of the injuries sustained, the plaintiff was unable to work for a period of one year after the date of the accident. In awarding the RM24,000 for loss of earnings the learned SCJ said as follows:

> Keterangan plaintif yang beliau bekerja sebagai welder dengan purata pendapatan RM2,500 sebulan tidak dicabar oleh peguam defendan.
>
> Mahkamah juga menerima keterangan plaintif yang beliau tidak dapat bekerja selama satu tahun selepas kemalangan.
>
> Selepas ditolak perbelanjaan persendirian seperti yang dihujahkan oleh peguam plaintif maka multiplicand adalah RM2,000 sebulan bagi tempoh 12 bulan. Mahkamah membenarkan tuntutan plaintif untuk kehilangan pendapatan berjumlah RM24,000 (RM2,000 x 12 bulan).

APPEAL AGAINST QUANTUM — THE LAW

[4] In an appeal against the quantum of damages, it is settled law that the onus is on the appellant to establish that the award may only be disturbed if the trial judge acted on a wrong principle of law or has misapprehended the facts or had made a wholly erroneous assessment of the damages suffered.

This principle was enunciated by the Federal Court in *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 where Suffian LP said at p 240:

> The principle upon which we can interfere with the award has been stated by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* as follows:
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> > Where an award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell*. *In effect the court before it interferes with an award of damages, should be satisfied that the judge had acted on a wrong principle of law, or has misapprehended the facts, or for these other reasons made a wholly erroneous estimate of the damages suffered*. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.
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> (Emphasis added.)

LOSS OF EARNINGS — THE LAW

[5] Loss of earnings has been conventionally divided into actual loss and future loss. Actual loss of earnings is calculated from the date of the accident up to the date of the trial. Loss of future earnings is calculated from the date of trial. However, since the coming into force of s 28A of the Civil Law (Amendment) Act 1984 on 1 October 1984 the previous distinction between pre-trial and post-trial loss of earning is no longer applicable. Section 28A prescribes a fixed multiplier to be calculated according to the age of the plaintiff at the date of the accident. Paragraph (c) in sub-s (2) of s 28A also prescribes certain conditions in assessing the loss of future earnings in personal injury claims. In order to claim for loss of future earnings it must firstly be established that the plaintiff must be below the age of 55 years at the time of the injury. Secondly, the plaintiff must have been in good health but for the injury. Thirdly, the plaintiff must have been receiving earnings by his own labour or other gainful activity before he was injured. In this case the plaintiff was below the age of 55 years of age at the date of the injury. But for the injury suffered as a result of the accident the plaintiff was also in good health. This appeal turns on the application of the third principle to the facts of the case — whether the plaintiff was receiving earnings before he was injured.

[6] In *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103 the Supreme Court took the view that any person who was not receiving earnings on the date of the accident does not qualify for loss of future earnings. In that case the plaintiff was a Dutch national who was a qualified registered nurse. She took no pay leave and went on a cycling tour. On 24 October 1984 while cycling towards Ipoh, she was knocked down by a bus. She suffered very serious injuries. At the High Court the point in issue was whether the plaintiff was entitled to claim for loss of future earnings. The High Court dismissed the claim for loss of future earnings. On appeal the Supreme Court held that as the plaintiff was on no pay leave and was not receiving any earnings at the time of the accident she was not entitled to any award of damages for loss of future earnings. Gunn Chit Tuan SCJ (as he then was), delivering the judgment of the court said at p 107:

> As stated above, s 28A(2)(c) of the Act should be construed as a whole. We notice that the Legislature has used the words 'at the time when he was injured' after the words 'fifty-five years or above'. So when the Legislature used the word 'before' in the same sub-para (i) in para (c) of that section we must assume that the Legislature had used the word 'before' intentionally and we are in no position to say whether it is a case of error on the part of the legal draftsman. But then in the same sub-para (i), the legislature had used the words 'receiving earnings'. Here we would agree with counsel for the respondent that we must note that the Legislature has intentionally used the continuous tense. Then when we move to sub-para (ii) we find that the Legislature had used the phrase 'at the time when he was injured' after the words 'only the amount relating to his earnings as aforesaid'. It is then seen that the intention of the Legislature that in awarding damages for loss of future earnings, only the amount that the appellant was receiving at the time he was injured can be taken into account which means that if the appellant was not receiving any earnings at that point in time, she does not qualify for any award for loss of future earnings.

[7] In *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 the plaintiff was 12 years of age when he was injured in a road accident. As a student he was not receiving any earnings. He claimed damages for his injuries and the High Court awarded him RM67,200 as general damages for prospective loss of future earnings. The defendants appealed against the said award. Allowing the appeal the Supreme Court said at p 44:

> We reiterate that s 28A(2)(c)(ii) which states that 'only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospects of earnings aforesaid being increased at some time in the future' makes the intention of the legislature abundantly clear and indeed the legislature had the prospect of future earnings (whatever be the label attached to it) in mind when the law was enacted.

[8] And continuing further down at the same page:

> It is abundantly clear that the legislature in its own wisdom, decided that an injured person ought not to get any damages in a claim either for loss of future earnings or loss of earning capacity *unless before the accident (at the date of the accident) he was in fact receiving earnings*. To hold otherwise would mean that the court is creating law to provide something which clearly the Legislature had no intention to do. We feel that our Legislature has enacted exhaustively and exclusively.
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> (Emphasis added.)

[9] The stand taken by the Supreme Court in *Dirkje Peiternella Halma*,was adopted by the Supreme Court in *Tan Kim Chuan*. Accordingly, the basis for the calculation of loss of future earnings is and commences from the date of the accident. It is therefore clear that a person who was not receiving earnings on the date of the accident is not entitled for any loss of future earnings. Such a person would include a person who was on no pay leave (as in *Dirkje Peiternella Halma*), unemployed (as in *Tan Kim Chuan*), recently retrenched, laid off temporarily or those whose employment are not permanent. It would also include a contract worker whose employment depends on the availability of contracts or projects and who was on the date of the accident unemployed.

APPEAL AGAINST THE AWARD FOR LOSS OF EARNINGS

[10] The defendant's submission is the SCJ had acted on a presumptive premise and presupposition that the plaintiff was receiving earnings at the date of the accident. The SCJ failed to take into account the fact that the plaintiff was a contract worker. The subcontract work done by the plaintiff was not permanent or continuous. The plaintiff's work depended on whether at any one time he was given a contract to fulfil. Upon the completion of one contract, the plaintiff may not necessarily be given another contract immediately; he may have to wait for a period of time. The evidence unequivocally shows that the plaintiff was unemployed on the date of the accident. Accordingly, it was submitted that taking all the circumstances into consideration the plaintiff could not be said to have been receiving earnings at the date of the accident. Learned counsel for the defendant cited the Supreme Court's decisions in *Dirkje Peiternella Halma*, and *Tan Kim Chuan*, in support of the defendant's contention that the plaintiff should not be entitled to any loss of earnings.

[11] In reply learned counsel for the plaintiff contended that the onus on the defendant/appellant is a heavy one and that it must be established that plainly that the trial judge's award was a wholly erroneous estimate(*Hang Jong*

Juan v Tan Yeo Soon [1986] 2 MLJ 5). In submitting that the SCJ's award for loss of earnings should not be disturbed, learned counsel argued that there is unrebutted evidence of the plaintiff receiving earnings at the date of the accident. In particular, learned counsel alluded to the entry pass (P3) issued to the plaintiff as supporting evidence thereof (*Ngooi Kim Chong v Subramanian a/l Maruthan & Anor* [1990] 1 CLJ 799; *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 3 CLJ 317).

[12] Finally, learned counsel for the plaintiff submitted that there was evidence that the plaintiff was a subcontractor and that he worked on one contract after another. By the nature of his occupation, the plaintiff would get another contract after having completed one. During the period between the completion of one contract to the commencement of work under a new contract the plaintiff may be out of work. This does not mean that the plaintiff was not in gainful employment. In support of his proposition learned counsel referred to *Low You Choy & Ors v Chan Mun Kit & Ors* [1992] 3 CLJ 1550. In that case the plaintiffs were unemployed and were not working on the date of the accident. Notwithstanding the aforesaid the High Court distinguished *Dirkje Peiternella Halma*, on the facts and held at p 1551:

> Sungguhpun kedua-dua plaintif pada hari kemalangan tidak berkerja, tetapi pada hari sebelumnya mereka telah bekerja. Satu atau dua hari tidak bekerja tidak boleh disifatkan seseorang itu tidak mempunyai pekerjaan. Walau bagaimanapun, Mahkamah bersetuju dengan peguam pihak defendan yang plaintif-plaintif tidak mempunyai perkerjaan yang tetap seperti kebanyakan tukang atau buruh yang mengambil upah atau bekerja dengan pemborong-pemborong. Mereka biasanya tidak bekerja sepanjang tahun atau bulan. Setelah siap sesuatu projek atau sesebuah rumah mereka terpaksa mencari kerja dengan pemborong yang lain atau menunggu pemborong mendapat kontrak yang lain pula. Hal keadaan seperti ini terdapat daripada keterangan plaintif-plaintif sendiri dan juga majikan seperti saksi plaintif No 2 dan saksi plaintif No 4.

[13] Learned counsel for the plaintiff also submitted that s 28A(2)(c)(ii) is inapplicable in this instance. It was contended that the subject of contention was not the loss of future earnings. The issue, instead, relates to the actual loss of earnings calculated from the date of the accident up to the date of the trial. There was evidence to show that the plaintiff was unable to work for one year. This evidence was not challenged by the defendant.

FINDINGS OF THE COURT

[14] The plaintiff's contention that the plaintiff was receiving earnings at the date of the accident is not supported by the evidence. On the contrary, the evidence points to the fact that the plaintiff was not receiving earnings on

the date of the accident. At the material time the plaintiff was without work. In *Ngooi Kim Chong*, the trial judge accepted that the plaintiff was receiving earnings at the date of the accident. The award for loss of pre-trial earnings was awarded on that basis. The claim for loss of future earnings was abandoned by the plaintiff as he was earning more than what he was earning before the accident. In *Abdul Ghani bin Hamid*, the trial judge found that at the date of the accident the plaintiff was working as a driver cum general worker. The trial judge also accepted the oral evidence of the plaintiff as to his salaries as a driver and general worker even though no documents were produced to support the plaintiff's assertion. In both cases the plaintiffs were receiving earnings at the date of the accident. Accordingly, the facts of both *Ngooi Kim Chong*, and *Abdul Ghani bin Hamid*, are clearly distinguishable from the present appeal and are of no assistance to the plaintiff's contention.

[15] Perhaps a more pertinent case is *Low You Choy*. In that case the plaintiffs were labourers. The first plaintiff was employed for about ten months in a year whilst the second plaintiff was employed for about eight months only. Both plaintiffs were not working on the date of the accident. However, they were working the day before. The trial judge noted that most labourers or skilled workers did not have permanent jobs. When a project or a house is completed, they either have to look for some other contractor to work for or wait until their present contractor gets another contract. Notwithstanding that the plaintiffs were not receiving any earnings on the date of the accident the trial judge awarded loss of earnings. The award may have been made under the special circumstances of the case. Be that as it may, the decision in *Low You Choy*, appears to be inconsistent with the principles enunciated by the Supreme Court in *Dirkje Peiternella Halma*, and *Tan Kim Chuan*. For this reason this court is not inclined to adopt a stand similar to that in *Low You Choy*.

[16] Applying the principles enunciated by the said authorities to the facts of this case, it is the court's finding that the learned SCJ had acted on a wrong principle of law. In making the award for loss of earnings the learned SCJ relied upon the conventional distinction between pre-trial loss of earnings and future loss of earnings. The plaintiff is not entitled to any loss of future earnings as the condition that the plaintiff must have been receiving earnings on the date of the accident was not satisfied. The learned SCJ failed to apply the provisions of s 28A(2)(c)(ii) and thereby made a wholly erroneous estimate of the loss of future earnings. In the circumstances the SCJ's award for loss of earnings is set aside. Accordingly, the defendant's appeal is allowed with costs.

Appeal allowed with costs.

Reported by Augustine Soosay